No. 03-5165

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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THORNTON v. UNITED STATES

RELEVANT DOCKET ENTRIES

United States District Court
Eastern District of Virginia (Norfolk)

CRIMINAL DOCKET FOR CASE #: 01-CR-235-1

11/15/01	1	CRIMINAL COMPLAINT as to Marcus Thornton, filed. [2:01-m-603] (nlyt) [Entry date 11/15/01]

* * *

12/12/01	9	INDICTMENT RETURNED AND FILED IN OPEN COURT as to Marcus Thornton (1) count(s) 1, 2, 3. On motion of govt. Court directed summons to issue for arraignment on 12/19/01 at 9:00 a.m. (arou) [Entry date 12/13/01]

* * *

12/19/01	–	Arraignment as to Marcus Thornton held before Magistrate Judge Tommy E. Miller (Richard Zahn, contract court reporter) USA appeared through Laura Everhart, AUSA; Deft appeared through Walter Dalton, FPD. Prelim. Motion Filings due 1/4/02 w/responses due w/in 11 days thereafter; Jury Trial set for 10:00 2/7/02. Deft waived formal arraignment; Deft plead not guilty; jury demanded. Court stated that deft must be present at prelim hearings unless he executes & files waiver of appearance form. Deft continued on present bond. Walter Dalton, FPD (arou) [Entry date 12/19/01]

* * *

1/7/02	11	MOTION by Marcus Thornton to Suppress (arou) [Entry date 01/08/02]

1/7/02	12	MEMORANDUM by Marcus Thornton in support of [11-1] motion by Marcus Thornton to Suppress, received (arou) [Entry date 01/08/02]
1/11/02	13	RESPONSE by USA as to Marcus Thornton re [11-1] motion by Marcus Thornton to Suppress (arou) [Entry date 01/11/02]

* * *

1/24/02	–	Motion hearing held as to Marcus Thornton re: [11-1] motion by Marcus Thornton to Suppress before Judge Henry C. Morgan Jr. (Diane Gray.) USA appeared through: Laura Everhart, AUSA. Dft(s) (on bond) appeared through: Walter Dalton, FPDA. Govt. pres. evidence. Court's findings read into record. Motion DENIED. Court to prepare order & kept file. Dft. cont. on present bond. (danc) [Entry date 01/25/02]
1/28/02	14	OPINION & ORDER as to Marcus Thornton denying [11-1] motion by Marcus Thornton to Suppress as to Marcus Thornton (1) (Signed by Judge Henry C. Morgan Jr. on 1/28/02) & filed on 1/28/02. cc to Counsel & AUSA (popo) [Entry date 01/29/02]

* * *

2/7/02	–	Jury trial proceedings as to Marcus Thornton held before Judge Rebecca B. Smith (Gloria Smith, OCR.) USA appeared through: Laura Everhart, AUSA. Dft(s) appeared, on bond, through: Walter B. Dalton, AFPD. Matter came on for trial by jury. Jury appeared as summoned and were sworn on their voir dire. 12 jurors and 2 alternate jurors were selected. Jurors not selected were excused subject to call. Opening statements heard. Witnesses were excluded from the courtroom.

Gov't presented evidence and rested. Out of the presence of the jury, deft. moved for judgment of acquittal pursuant to Rule 29. Court ruled from the bench and denied the motion. Deft. presented evidence and rested. Deft. renewed motion and court denied motion. Jurors excused and court adjourned until Friday morning, February 8, 2002, at 11:00 a.m. (mgra) [Entry date 02/07/02]

* * *

2/8/02	–	Continuation of jury trial proceedings as to Marcus Thornton held before Judge Rebecca B. Smith (Gloria Smith, OCR.) USA appeared through: Laura M. Everhart, AUSA. Dft(s) appeared through: Walter B. Dalton, AFPD. Counsel and deft. appeared. Court and counsel reviewed jury instructions. Jurors appeared. Final arguments of counsel heard. Jury received court's charge and retired to jury room to begin their deliberations. Sometime later, the jury returned with the following verdict (attached). Jurors polled, all answered in the affirmative. Special Jury Verdict Form, filed. Jurors excused subject to call. Court granted govt's request to substitute photographs for the drugs and firearm. Sentencing set for Friday, [May] 3, 2002, at 10:00 a.m. Court detained deft. until his sentencing. Deft. remanded. (mgra) [Entry date 02/08/02]
2/8/02	16	JURY VERDICT as to Marcus Thornton Guilty: Marcus Thornton (1) count(s) 1, 2, 3 (mgra) [Entry date 02/08/02]

* * *

2/15/02	17	MOTION by Marcus Thornton for New Trial (popo) [Entry date 02/15/02]

2/15/02 18 MEMORANDUM by Marcus Thornton in Support of [17-1] Motion for New Trial (popo) [Entry date 02/15/02]

* * *

2/19/02 20 ORDER denying [17-1] motion for New Trial as to Marcus Thornton (1), entered and filed 2/19/02 (Signed by Judge Rebecca Smith) Copies Mailed: 2/19/02, ob (arou) [Entry date 02/19/02]

2/20/02 21 RESPONSE by USA re [11-1] motion by Marcus Thornton to Suppress (arou) [Entry date 02/20/02]

* * *

5/6/02 24 JUDGMENT Marcus Thornton (1) count 1: 120 MONTHS IMPRISONMENT; 8 YEARS SUPERVISED RELEASE; $100.00 SPECIAL ASSESSMENT. Count 2: 120 MONTHS IMPRISONMENT TO BE SERVED CONCURRENTLY WITH COUNT 1; 3 YEARS SUPERVISED RELEASE TO BE SERVED CONCURRENTLY WITH COUNT 1; $100.00 SPECIAL ASSESSMENT. Count 3: 60 MONTHS IMPRISONMENT TO BE SERVED CONSECUTIVELY WITH COUNTS 1 AND 2; 5 YEARS SUPERVISED RELEASE TO BE SERVED CONCURRENTLY WITH COUNTS 1 AND 2; $100.00 SPECIAL ASSESSMENT. ent 5/3/02 and filed 5/6/02 (Signed by Judge Rebecca B. Smith) Copies Mailed: 5/7/02 (scar) [Entry date 05/07/02]

* * *

5/9/02 25 NOTICE OF APPEAL by defendant. (ssha) [Entry date 05/10/02]

* * *

RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
U.S. Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 02-4382

5/14/02 Criminal case docketed. (amy)

* * *

7/30/02 Brief and joint appendix filed by Appellant Marcus Thornton. Copies of brief: 6 # brf pages: 28 Sufficient [Y/N]?: Y. Copies of apx: 5 # apx pages: 249. 2-sided copying [Y/N]?: Y. Method of filing w/ court: HD Date of Service on parties: 7/30/02 Type of service on parties: HD Appellee brief due 8/20/02 for US. [02-4382] (aweb)

8/19/02 Brief filed by Appellee US. Copies of brief: 8 # brf pages: 14. Sufficient [Y/N]?: y. SEALED? [Y/N]: n. Method of filing w/ court: PM Date of Service on parties: 8/19/02 Type of service on parties: PM [02-4382] (mft)

8/29/02 Reply brief filed by Appellant Marcus Thornton. Copies of brief: 6 # brf pages: 12. Sufficient [Y/N]?: Y. SEALED [Y/N]?: N. Method of filing w/ court: pm Date of Service on parties: 8/29/02 Type of service on parties: pm [02-4382] (sn)

* * *

2/24/03 Oral argument heard. Courtroom Deputy: JLC, Jr. [02-4382] (jc)

4/3/03 Published, authored opinion filed. [02-4382] (sn)

4/3/03 Judgment order filed. Decision: affirmed. EOD Date: 4/3/03. [02-4382] (sn)

4/25/03 Mandate issued. [02-4382] (sn)

* * *

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCUS THORNTON,
Defendant.

DOCKET NO.
2:01cr235

TRANSCRIPT OF MOTION TO SUPPRESS
PAGES 1-25

BEFORE THE HONORABLE
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

January 24, 2002

11:00 a.m.

APPEARANCES:

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Appearing on behalf of the United States
By: Laura M. Everhart, Esq.
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COURT STAFF PRESENT:
Cordel Faulk, Law Clerk
Sandra Dance, Deputy Courtroom Clerk
John V. King, Court Security Officer
Diane M. Gray, Official Court Reporter

[2] (Proceedings commenced at 11:05 a.m.)

THE CLERK: Case number 2:01cr235, United States of America versus Marcus Thornton.

Ms. Everhart, is the government ready to proceed?

MS. EVERHART: United States is ready, Your Honor.

THE CLERK: Mr. Dalton, is the defendant ready to proceed?

MR. DALTON: We're ready, Your Honor.

THE COURT: All right. Counsel, in reading your memorandum, there doesn't seem to be any factual dispute; am I correct in that?

MS. EVERHART: I would think that that was probably correct, Your Honor. I know that Mr. Dalton, he was provided with discovery, of course, and got all of the officer's reports, which not every detail of the arrest was included in his reports, but the essential facts, I think, are the same.

THE COURT: Well, I don't know whether it's necessary to present factual evidence on both sides or not. I just read the two briefs, and there just didn't seem to be any difference in their recitation of the facts.

MS. EVERHART: I think other than a few details, Your Honor, that's correct.

MR. DALTON: I believe that is correct, Your Honor.

THE COURT: Well, if there are a few details in dispute, those details might be important.

[3] MS. EVERHART: Your Honor, I think I'd like to call the officer just to make sure that the record is clear.

THE COURT: All right.

MS. EVERHART: That would be Officer Nichols.

OFFICER DEION L. NICHOLS, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. EVERHART:

Q. Could you state your name, please, sir, and tell us where you are employed?

A. Officer Deion L. Nichols, Norfolk Police Department.

Q. Were you so employed on July 21st, 2001?

A. Yes, I was.

Q. On that date did you have occasion to have some contact with the defendant, Marcus Thornton?

A. Yes, I did.

Q. And is the defendant seated next to Mr. Dalton at the table?

A. Yes.

Q. Could you tell us what first drew your attention to the defendant?

A. I was in an unmarked police unit, and I was in the 7100 block of Sewells Point Road. I observed a gold Lincoln Town Car in my side or rearview mirror kind of pull up to the left side of me, but it wouldn't come all the way up to me, and I [4] assumed that the person in the car spotted and knew that I was a police officer and started to slow down for whatever reason.

Q. Okay. You were in an unmarked car?

A. I was in an unmarked car.

Q. Go on.

A. And it kind of red-flagged me for a second. I said, "I wonder why this person is not pulling up to me." So I slowed down. And the person in the car began to slow down even more. And so I said okay. I pulled over to a side street, made a right turn and looped my car around, and as the car passed me, I got in behind it, and I ran the tags on the car.

It was a gold Lincoln Town Car with the tags Yankee Henry William 3564, and those tags came back to an '82 Chevy two-door.

So I followed the individual, Mr. Thornton, into the 7600 block of Sewells Point Road, which is a parking lot. He parked his car and exited the vehicle. I pulled in behind him and exited my vehicle also.

Q. Now, was Mr. Thornton, did that car that you pulled Mr. Thornton over in, was that the car that you had initially seen?

A. No.

Q. Tell us about that a little bit.

A. I guess it was a gold car in color, and I was wondering why, again, why this person wouldn't pull up completely at my [5] side, and so I – again, I made the right turn, and I just waited for this car to come by me so I can check this guy out who was driving, and I assumed it was the same car, so I pulled in behind him, and that's when I ran the tag.

And when I noticed it didn't come back to that car, didn't match that car, I followed the car until it parked at 7600 Sewells Point Road.

Q. So Mr. Thornton got out of his car, you got out of your car, and then what happened?

A. I approached him, asked him for his driver's license, and I told him right up front that the tags on his car doesn't come back to his vehicle. He appeared nervous, right away started rambling and saying that –

THE COURT: You were not in uniform, I assume.

THE WITNESS: Yes, I was.

THE COURT: You were in uniform?

THE WITNESS: I was in an unmarked car, Judge, but in uniform with my badge on display.

THE COURT: All right.

THE WITNESS: He started rambling and licking his lips. He was sweating. He said that someone

had just given him the car. I told him to calm down. I asked him why was he so nervous. He stated for no reason.

For officer safety, I asked him if he had any narcotics or weapons on him. He stated no. I asked him was [6] there any weapons or narcotics in the car. He said no. I patted him down, again for officer safety. I felt a bulge in his left front pocket.

BY MS. EVERHART:

Q. Okay. Now, did you ask him if you could pat him down for officer safety?

A. Yes.

Q. Okay. Go on.

A. And I felt a bulge in his left front pocket. I didn't know what it was, so I just kind of casually asked him, "Do you have any illegal narcotics on you?" He lowered his head and said, "Yeah, I have a bag of weed." I simply asked him if I could have it.

He reached into his pocket and pulled out two individual bags, one containing three bags of a green leafy material consistent with marijuana, and the other with a large amount of an off-white rocklike substance consistent with crack cocaine. I handcuffed him at that point, advised him that he was under arrest.

Incident to that arrest, I searched the vehicle, which he was the sole occupant of, and found a BryCo .9-millimeter handgun right under the front driver's seat where he was sitting at in the car.

Q. And just so the record is clear, when you asked him if you could pat him down for officer safety, he said yes?

[7] A. Yes.

Q. And he was the one who took the items out of his pocket, not you?

A. He reached into his own pocket and gave me those items himself.

Q. What happened on the way to the police station?

A. He told me that – without any provocation from me, he told me that he had just robbed some cat out at Ocean View, and that's where he got the dope from.

Q. That was just a spontaneous statement on his part?

A. Yes.

MS. EVERHART: Please answer any questions Mr. Dalton or the court may have for you.

CROSS-EXAMINATION

BY MR. DALTON:

Q. Officer Nichols, you did indicate to the court that you were in uniform on that day?

A. Yes, I was.

Q. And you were alone. There was no one else in your unit with you?

A. That's correct.

Q. But you were in an unmarked police car; is that correct?

A. Yes, I was.

Q. I'm trying to make sure I understand what your earlier testimony was about the vehicle you first observed. You're [8] saying that there was a different car that you thought the driver recognized you as a police officer, and that aroused your suspicion?

A. Yes. Similar car in size and shape, even down to the color, but it wasn't that car. It aroused my suspicion because he's wouldn't pull completely up to me. I thought maybe the guy saw my arm out the window, saw my badge and kind of laid back a little bit, and it kind of just aroused my suspicion a little bit.

Q. Did you run a check on the tag on that vehicle?

A. No. Because he wouldn't pull up to me. He wouldn't pull up to me, so I pulled into a side street on the right and looked around real quick, and as Mr. Thornton's car passed me, I pulled in behind him, and that's when I ran a check on the tag, and it revealed that it didn't belong on that car.

Q. When you ran the check on Mr. Thornton's vehicle, did you believe it was the same vehicle?

A. I believed, yes. it was. I thought it was. I mean, I didn't know. Yeah, I thought it was. I just ran a check on that tag to see who this guy was.

Q. So you weren't just running a random check on Mr. Thornton's vehicle?

A. No. I thought it was the guy. Then I found out later on probably it wasn't the guy because the car was a little smaller, but at that time I thought it was the individual who [9] would not pull up to me.

Q. Do you recall testifying in a preliminary hearing in Norfolk General District Court on September 24th of 2001 in this matter when it was in state court?

A. I believe I –

Q. Mr. Thornton had some state charges that were then pending, and you testified at his preliminary hearing in Norfolk General District Court, Courtroom Number 5, on September 24th, 2001?

A. I can't remember the date.

Q. Do you recall testifying previously at any time in state court about this same subject matter of why you stopped Mr. Thornton?

A. Yes, I do.

Q. Do you recall –

MS. EVERHART: Excuse me. Could I have a page and line number?

MR. DALTON: Page 5, starting around line 14.

BY MR. DALTON:

Q. Do you recall you were asked the question by Christine Bruen with the Norfolk Commonwealth Attorney's Office about describing why you came into contact with Mr. Dalton?

THE COURT: Mr. Dalton, if you are going to use the transcript, I'm going to ask you to quote it verbatim, not paraphrase it.

[10] MR. DALTON: Yes, sir.

BY MR. DALTON:

Q. Do you recall testifying in court and having Christine Bruen of the Norfolk Commonwealth Attorney's Office ask you questions on a direct examination regarding charges against Mr. Thornton?

A. Yes.

Q. She asked you a question, I'm quoting now, "Please describe to the court how it was you came in contact with Mr. Thornton."

And your answer then was: "It was about 11:30 on 7-21 of this year in the city. I observed the defendant driving a gold Lincoln Town Car with Virginia tags Henry William 2564 in the 7600 block of Sewells Point Road. I just randomly ran a check on the tag, and it came back to a 1982 Chevy two-door. I followed the vehicle into a parking lot of the 7600 block of Sewells Point Road."

Do you recall testifying to that effect?

A. That wasn't the tag number I had in my notes. The tag number I have is Yankee Henry William 3564.

Q. Okay. But how about the statement that you apparently made on that day, "I just randomly ran a check on the tag, and it came back to a 1982 Chevy two-door"?

A. When I pulled in behind him, that's when I ran the tag.

Q. But in other words, it was not a random check; you were [11] running a check for this other reason that you stated about this other car having previously gone by you?

A. Yes. The car didn't go by me. He wouldn't pull up to me. I pulled in to the right and looked around and got in behind the vehicle.

Q. Now, you said Mr. Thornton pulled his vehicle over and parked and got out; is that correct?

A. Yes. He pulled into a parking lot, exited his vehicle. I pulled in behind him, exited my vehicle.

Q. So he had already stopped and gotten out of the vehicle before you could pull him over or anything of that nature?

A. Yeah, that's correct.

Q. Had you intended to stop the vehicle because of the irregularity about the tags?

A. Yes, I was. I would have, but he pulled into the parking lot before I had a chance to do so.

Q. Now, when you walked up to him, you said you told him right off the bat that the tags didn't match the vehicle he was driving; is that correct?

A. Yes. I asked for his driver's license first, and then I told him that the tags didn't belong on the car.

Q. Now, when you ran the tags, they came back registered to a different vehicle; is that correct?

A. Came back to an '82 Chevy two-door.

Q. And that '82 Chevy two-door is registered in the name of [12] Marcus Thornton, was it not?

A. I don't know.

Q. You don't know who it was registered to?

A. I can't recall. I didn't put that in my notes whether it came back to him or not, but it didn't belong on that Lincoln Town Car.

Q. And once you determined that it didn't match, were you suspicious that the car was stolen or something of that nature?

A. I didn't know whether it was stolen or not. I did do a VIN check on the car later, and the car was not stolen.

Q. So the car was not stolen, and you did check that out?

A. Yes.

Q. At what point did you do that?

A. After I took the tags off the car, I went over and contacted the dispatcher and ran the VIN to see – I believe it came back to somebody in Virginia Beach, I believe. I'm not sure.

Q. Did you pursue any sort of charges against Mr. Thornton regarding the irregularity about the tags?

A. I don't believe I wrote him a summons, but I don't know. I can't recall.

Q. There is some citation you could have given him?

A. I could have given him tags from another vehicle on his car.

[13] Q. But you didn't do that; right?

A. I don't believe I did. I can't recall writing him a summons. I just focused on the more serious charge, which was this.

Q. At the point where you had him, he's parked and out of the car, you're parked, out of your car, and you approach him and ask him for his driver's license, he gave that to you, didn't he?

A. I don't recall whether it was an I.D., but he gave me some kind of identification, I believe.

Q. And did it appear to match up? Was it a picture I.D.?

A. I believe so, yes.

Q. And you said when you started talking about the tags not matching, that he appeared to you to be nervous; is that correct?

A. Very nervous, sweating. His eyes were going back and forth and licking his lips.

Q. This was in July, right, July 21st?

A. Yes.

Q. Around midday?

A. 11:30, yes.

Q. Kind of warm, wasn't it?

A. Yeah, I guess so. I can't recall the weather.

Q. Do you routinely stop people for traffic violations and have them not be nervous?

[14] A. I mean, he appeared to be overly nervous, overly nervous.

Q. Now, you indicated that when you decided for your own safety that you had to ask him if he had any, I believe as you put it, any narcotics or weapons on him; is that correct?

A. Yes.

Q. Why did you include narcotics if it was for your safety?

A. It's just a question that I ask. When people are nervous like that, I just – I've done this a whole lot, and usually when people's demeanor is like that, they are trying to hide something, and that's almost always the case, and in this case it was also.

Q. So you thought he was trying to hide something, that's why you pursued that line of questioning?

A. Yes.

Q. And you said that you asked him if you could do a patdown before you did a patdown?

A. Yes. Asked him if he had any narcotics. "Do you mind if I pat you down real quick?" I patted him down and felt a bulge in his pocket.

Q. Okay. What did the bulge feel like? Could you describe that to the court, please?

A. It was just a bulge. It could have been tissue paper or it could have been anything. I just asked him, "Do

you have any narcotics on you, any illegal narcotics?" He said, "I've [15] got some marijuana, some weed on me."

Q. So from the patdown, the way it felt, you said it could have been anything?

A. It could have been anything. I didn't know what it was, but I wanted to find out what it was, so I asked him.

Q. Well, in other words, it didn't immediately indicate to you that it was a weapon, did it?

A. It wasn't hard.

Q. And it definitely wasn't some sort of contraband like a big chunk of crack cocaine or something that you could obviously feel?

A. I didn't know what it was. That's why I asked him.

Q. At that point you said instead of – did you ask him for a consent to search his person at that point?

A. I patted him down. I didn't dig my hands into his pocket or anything like that. Just the outer part of him.

Q. I'm not trying to trick you. I'm just trying to follow through this.

You said you asked for consent for the patdown, and then you did it; right?

A. Yes.

Q. Did you ask for consent to search after you felt the bulge?

A. I didn't search him.

Q. I know that. I know you said that before. But you [16] didn't ask him, "is it okay to search you?" Did you? I mean, you didn't ask him, "Is it okay if I search you?"

A. I can't recall whether I did or not.

Q. Instead, you said you asked him if he had any narcotics on him?

A. I asked him, "Do you have any illegal narcotics?" And he said –

Q. And you said in response to that, he said he had some weed?

A. Yes.

Q. And then did you ask for any consent to search at that point?

A. No. I just asked, "May I have the weed? May I have the narcotics?" And he reached into his pocket.

Q. And he gave it to you?

A. Yes.

MR. DALTON: I don't believe I have any other questions, Your Honor.

MS. EVERHART: I have no further questions, Your Honor.

THE COURT: All right. Thank you, Officer. You may step down.

THE WITNESS: Thank you.

THE COURT: Does the government have any further evidence?

[17] MS. EVERHART: No, Your Honor.

THE COURT: Does the defendant wish to present any evidence.

MR. DALTON: No, sir.

THE COURT: All right. Does the government have any argument?

MS. EVERHART: Your Honor, I believe I set out my argument in my response to the defendant's motion. But just briefly, this was a Terry-stop, and the officer was certainly perfectly well within his rights and well within the bounds of the Constitution to have run the man's tags even if he didn't have any suspicion. They are out in plain view on the road, and I think police officers probably do that quite frequently, and at that point he knew that there was something wrong.

The man obviously was in violation of the law, and he was well within the bounds of the Constitution to approach him and ask him questions without advising him of his Miranda rights. To ask if he could pat him down. The defendant consented. The defendant admitted that he had drugs on his person and handed them over voluntarily to the police officer in the case.

There was no actual search by the police officer, and certainly he was well within his rights to search the vehicle in this case. First of all, because it was incident to a lawful arrest, and also because he could not leave the car in [18] that condition or allow it to be drived – driven away, rather, because the tags did not match the vehicle, so it would have had to have been impounded in any event.

So, Your Honor, for these reasons, we believe that the searches in this case and the statements should all be admissible. Thank you.

MR. DALTON: Your Honor, while I understand that the officer may have been justified initially, I think it's still questionable as to why he initially was having contact with Mr. Thornton, but even if you get beyond the point where he's – it's not really even a traffic stop. He said he intended to stop him, but Mr. Thornton had already stopped. He approached him –

THE COURT: Well, there's no complaint about him running the license plate, is there?

MR. DALTON: Well, I think it's – there's no question that he ran it, Your Honor. This is the first time today that I've learned this aspect of it about observing a different vehicle and apparently thinking that was the same vehicle.

THE COURT: Does it make any difference why he ran it?

MR. DALTON: I don't know that it does, Your Honor, but moving on to where I think the –

THE COURT: I don't think it does. I don't see any [19] reason why a law enforcement officer can't check any license plate that he wants to. There's no invasion of anyone's privacy of running a license plate.

MR. DALTON: Yes, sir. I think the problem comes in, Your Honor, after Mr. Thornton has parked his vehicle and gotten out. The officer parks his vehicle and gets out and approaches Mr. Thornton. He asked him for some identification. He provides that.

The only thing that he's got to go on at that point after having run the license plate is that it comes back registered to a different vehicle, so Ms. Everhart in her pleading indicates that the officer was justified in suspecting things like perhaps it was a stolen car. Well, he apparently ran the VIN, and it was not stolen.

THE COURT: I think he ran the VIN, as I understood it, after he had completed the arrest and so forth.

MR. DALTON: That may be the case, Judge. I believe that you're correct there.

THE COURT: That's the way I understood his testimony. He said when he was removing the license plates, he ran the VIN.

MR. DALTON: Yes, sir. That is consistent with what I'm representing to the court, and I think the problem here is that rather than pursue the investigation of the irregularity about the tags, the officer's immediate attention turned to [20] weapons and narcotics.

The first thing he apparently said to him was that for his own safety, as he put it, that he asked if Mr. Thornton had any weapons – excuse me, narcotics, actually first, or weapons on him, and he said no. And it turns out he didn't have any weapons on him. He asked him if he had anything like that in the car. He said no.

Then the officer was candid, apparently, and indicated that he thought he was trying to hide something, so he patted him down, didn't know what it was, and instead of asking for a consent to search or anything like that, he just goes ahead and asks him again, "Do you have any narcotics on you?" Mr. Thornton at that point admitted to

him that he had weed in his pocket. Again, instead of asking for any consent to search, he asked him to take it out.

I would submit, Your Honor, that this is exceeding the scope of a Terry-stop, and the case law, I would submit, supports our position. The case of *United States versus Rusher*, a Fourth Circuit case that's cited in my motion, states that in carrying out a routine traffic stop, a law enforcement officer, quote, may request a driver's license and vehicle registration, run a computer check and issue a citation. Any further detention for questioning is beyond the scope of the Terry-stop and, therefore, illegal unless the officer has a reasonable suspicion of a serious crime.

[21] All this officer could really articulate was that he thought that Mr. Thornton was trying to hide something was the way he put it. I would submit he had no articulable suspicion that Mr. Thornton was armed before he even did the patdown. All he's really stopped him for is perhaps being in a stolen car or putting the license plates from one car onto another car. He didn't even pursue that at all. He admitted that. He didn't charge him with that. He didn't even pursue it.

His attention immediately focused to I've got a young man here, and he starts asking him about weapons and drugs, and I would submit that that exceeds the bounds of a traffic stop under *Rusher*. It's not a good Terry-stop. He exceeded the – what he would be allowed to do properly under that.

And I think along the lines of that, Your Honor, there's the so-called Plainfield doctrine as articulated in the United States Supreme Court case of *Minnesota versus Dickerson* that contraband discovered during a lawful

Terry-stop is admissible so long as the search does not exceed the bounds permitted by *Terry*, and there's some language in there that indicates that, you know, if a mass or contour or shape of an object makes the identity immediately apparent, the officer may lawfully seize it.

On the other hand, if an officer has determined that the object is not a weapon and that the shape or size does not indicate it's contraband, then the search must stop. So he [22] certainly wouldn't have been authorized to search him at that point, but instead he proceeds to ask the defendant questions to get him to admit that he apparently had the marijuana on him, and he went from there.

So I would submit that the officer exceeded the authority that he lawfully had under this situation, and I would ask the court to grant the motion.

THE COURT: Well, the court's going to deny the motion. I think that the officer certainly had the right to check the license plate. I don't believe that there's any expectation of privacy or privacy rights with respect to a person's license plate. I think a law enforcement officer can check a license plate for any reason whatsoever whenever he feels so advised.

Having checked the license plate, and, again, I don't think it makes any difference whether it was done randomly or whether it was done because he thought this was the vehicle which had acted suspiciously, he had a right to check it. He then checked it and found that it was operating on the wrong license plates, which in itself is an offense.

He says he was going to stop the vehicle, which certainly would have been a lawful stop, but the defendant

voluntarily stopped, so he proceeded to ask the usual questions that you would ask in a stop, and then he asked for his own protection. Having arrived at the point where the vehicle had [23] illegal tags, then the officer's got to make a decision as to what's going to happen to the vehicle. The vehicle – is he going to tell the defendant to drive away with illegal tags on it or what?

So he arrives at that point, and I think he certainly had a right to make inquiry and to pat the defendant down for his own safety. And when he found the bulge, when he patted him down – and I might say that he consented to the patdown. There's no dispute in the evidence. He didn't say no. He consented to being patted down, so he was patted down. And he found a bulge. He didn't search the man. He didn't seize the object at that point. He said, "Do you have any narcotics?" The man said, "Yes." He said, "Can I have them?" And he handed them to him.

I don't think that there was ever an arrest until after the narcotics were handed to the officer. I think everything that happened between the time of the stop and the time that he was arrested were natural and probable results of his lawful stop of the defendant. Well, what was equivalent to a lawful stop, so I see no reason to suppress the drugs that were voluntarily handed over to him at that point.

And then after that, after the arrest, the officer certainly had the right to search the car for an inventory search as well as a search incident to arrest. I think once he was arrested, he had the right to search at least the passenger [24] compartment of the car based on the arrest. And I think he also had the right to make an inventory search of the car because the car had to be towed away. Or

it certainly wasn't going to be driven away by the defendant.

And as far as the statement is concerned, again, there's no conflict in the evidence that the statement was unsolicited. He was under arrest at that point, and there's no evidence that the officer said, "Where did you get the drugs?" Instead, the defendant just volunteered the fact that he acquired the drugs by robbing someone. Again, that was not the result of any interrogation or anything other than a voluntary statement on the part of the defendant. So I see no reason to suppress that evidence either.

So the court is going to overrule the motion with respect to the narcotics that were seized, with respect to the weapon, and also with respect to the statement.

All right. The marshals may take charge of the defendant.

MR. DALTON: Your Honor, he's –

THE COURT: He's not in custody?

MR. DALTON: No, sir. He's been released on –

THE COURT: Oh, I'm sorry. I assumed he was in custody. He's on bond?

MR. DALTON: Yes, sir.

THE COURT: Okay. Well, then, he won't be taken into [25] custody at this point.

All right.

(Hearing concluded at 11:33 a.m.)

C-E-R-T-I-F-I-C-A-T-E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This 15th day of February, 2002.

/s/ Diane Gray
Diane Mason Gray,
RPR, CRR, CVR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,

v. **CRIMINAL NO: 2:01CR235**

MARCUS THORNTON,

DEFENDANT

OPINION AND ORDER

(Filed Jan. 28, 2002)

This matter comes before the Court on Defendant Marcus Thornton's motion to suppress any and all evidence accumulated after a July 21, 2001 encounter he had with a Norfolk police officer, which resulted in his arrest on narcotics and firearms charges. Following a hearing on January 24, 2002, the Court **DENIED** the Defendant's motion to suppress. This opinion further sets out the reasoning for the Court's decision.

FACTUAL BACKGROUND

On July 21, 2001, Norfolk Police Officer D.L. Nichols observed a gold vehicle on Sewell's Point Road that was hesitant to pull next to his unmarked police cruiser. Thinking the driver of the gold vehicle suspected he was a police officer, Nichols felt the behavior of the gold vehicle's driver was suspicious. After maneuvering to get behind a gold vehicle he thought to be the one he observed earlier, Officer Nichols ran a check on the license plates of a gold

Lincoln Town Car.[1] The check of the tags found they belonged on a 1982 two-door Chevrolet – not a Lincoln Town Car.

In an unmarked police car with no lights flashing or siren ringing, Nichols began to follow the automobile. The car pulled into a shopping center parking lot, and Nichols continued to follow. After parking, the driver, later identified as Marcus Thornton, stepped out of the automobile and proceeded toward the shopping center. Thornton was the lone occupant of the gold vehicle.

Officer Nichols pulled into the same parking lot, stepped out of his automobile, and approached Thornton. As the defense points out in its motion to suppress, the officer in no way indicated a show of law enforcement authority when he approached Thornton, Mot. to Supp. at 1, although he was in uniform. Nichols asked Thornton for his driver's license and registration. He then informed Thornton that the plates did not belong on the gold Lincoln. After that point, the officer felt that Thornton appeared more nervous than normal for an individual he stops.

Officer Nichols asked Thornton if he had any guns or narcotics on him. Thornton indicated that he did not. Officer Nichols asked the Defendant if he would mind a pat-down search, and Thornton consented. Feeling a bulge, he asked Thornton if the bulge was narcotics. The Defendant replied that he had some "weed" on him. The police officer asked the Defendant for the contraband, and

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[1] Nichols is now unsure whether the gold Lincoln Town Car he managed to get behind was the one that first aroused his suspicion.

Thornton handed the officer two plastic bags, one that appeared to contain marijuana, the other containing a substance consistent with the general appearance of crack cocaine.

The officer then informed Thornton that he was under arrest. The Defendant was placed in the back of the police cruiser, while the officer went to search the automobile incident to the arrest of Thornton. A 9mm semi-automatic weapon was found under the driver's seat of the gold Lincoln Town Car. While on the way to the station, Thornton, unsolicited by Officer Nichols, said the drugs were not his, but instead belonged to an individual he had just robbed.

THE MOTION TO SUPPRESS

The Defendant argues that the officer's stop of him at the shopping center was an illegal seizure when the conversation was expanded beyond what was necessary to investigate the traffic stop. The defense further believes that the [sic] Thornton should have been read his Miranda warnings before he was questioned about weapons and narcotics.

a. The License Plate Check

While they do not belabor the point, both in their brief and during the hearing the defense questioned the basis for the officer to check the license plates on the gold Lincoln Town Car. The case law is clear on this point, one does not have a reasonable expectation of privacy in their vehicle's license plates. *United States v. George*, 971 F.2d 1113 (4th Cir. 1992) ("[O]ne does not have a reasonable expectation of privacy in the visible exterior parts of an

automobile that travels the public roads and highways."); *see also, e.g., Katz v. United States*, 389 U.S. 347 (1967) (holding that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection"); *New York v. Class*, 475 U.S. 106 (1986) (holding that there is no reasonable expectation of privacy in a vehicle identification number); *United States v. Hensel*, 699 F.2d 18 (1st Cir[.] 1983) (holding that viewing a license plate on a parked car was not a search for Fourth Amendment purposes). A police officer who views a license plate attached to a vehicle in plain view of the public has every right to run a check on it in furtherance of their law enforcement duties, whether it be done randomly or for a specific purpose. *See generally Id.* [sic]

b. The Terry Stop Was Properly Conducted

The rules governing Nichols' encounter with Thornton were laid down by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). An officer must first have *reasonable suspicion* that criminal activity is afoot before a Terry stop can be conducted. *Terry v. Ohio, supra.* After he discovered the vehicle was improperly tagged, Nichols' [sic] has [sic] the requisite level of suspicion to approach the Defendant.

When reasonable suspicion exists to warrant a Terry stop, an officer is entitled to conduct a frisk and limited search for weapons if he reasonably believes that his safety, or someone in proximity, is in danger. *United States v. Baker*, 78 F.3d 135 (4th Cir. 1996). For a more invasive search, normally a warrant or probable cause is constitutionally necessary. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It is well settled, however, that *voluntarily consenting* to a search is an exception to the

above constitutional requirements. *U.S. v. Boone*, 245 F.3d 352 (4th Cir. 2001); *see also Id.* [sic]

Given that the Defendant voluntarily consented to the pat-down search, he may not claim that it was done in violation of his constitutional rights. Even had he not consented to the pat-down search, Officer Nichols' [sic] was well within his rights to conduct it. Accordingly, the Court **FINDS** that the pat-down search was based upon voluntary consent, and therefore not a violation of Thornton's rights.

c. The Defendant's Right to Miranda[2] Warnings Had yet to Attach

One's right to *Miranda* warnings only attaches when one is facing *custodial* interrogation. When a law enforcement officer is merely having a non-custodial conversation with an individual, *Miranda* Rights have yet to attach. *See, e.g.*[,] *Stansbury v. California*, 511 U.S. 318 (1994). Using a totality of the circumstances test, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. "The ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.*

Beyond wearing a uniform, the officer displayed no outward indicia of police authority that could objectively be viewed as having converted the Terry stop into a

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

custodial situation. Moreover, he and the Defendant were in the midst of a non-custodial conversation in the middle of a shopping center parking lot, not at the station house behind locked doors – further separating this from the normal formalities of a custodial interrogation.

During the non-custodial conversation, the officer asked Thornton whether he had any weapons or narcotics on his person. As stated above, Thornton replied no, then *consented* to a pat-down search. When asked about the bulge felt by the officer, the Defendant *voluntarily* handed over contraband. The officer asked if the bulge was drugs, and the Defendant admitted it was and then, when requested, voluntarily handed him narcotics. The Court **FINDS** that the objective circumstances of this encounter did not create a restraint on freedom of movement of the degree associated with a formal arrest, and the necessity to administer a *Miranda* warning to the Defendant had not been triggered until Thornton's formal arrest.

d. The Search of the Gold Lincoln Town Car

"[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). After the Defendant voluntarily handed the narcotics to the police officer, probable cause existed and Nichols' arrest of Thornton was lawful. After the lawful arrest took place, a search of the automobile incident to that arrest was not a violation of Thornton's constitutional rights.

Furthermore, since the vehicle could not be driven due to its improper tags, it was to be impounded. The routine,

and well-established, practice of securing and inventorying contents of impounded automobiles "developed in response to three distinct needs: the protection of the owner's property while it remained in police custody, protection of the police against claims or disputes over lost or stolen property and protection of the police from potential danger." *South Dakota v. Opperman*, 96 S.Ct. 3092, 3097 (1976). Therefore, the Court **FINDS** that the search of the gold Lincoln Town Car, which produced the 9mm semi-automatic weapon, was proper under the circumstances.

e. The Inculpatory Statement in the Police Car

As the *Miranda* Court made clear in its ruling, "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*[,] 384 U.S. at 478. Interrogation has since been defined as involving "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). When Thornton made the statement about stealing the drugs from another individual, it was not in response to any manner of express questioning or its functional equivalent. The Court **FINDS** the statement was made freely and voluntarily, and therefore is available for use by the government.

CONCLUSION

For the above state [sic] reasons, the Court **DENIES** the Defendant's motion to suppress any and all evidence seized as the result of the July 21, 2001 encounter he had with Officer Nichols.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record.

It is so **ORDERED**.

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
January 28, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	CRIMINAL ACTION
	)	
v.	)	NO. 2:01cr235
	)	
MARCUS THORNTON,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

February 7, 2002

(FIRST DAY OF JURY TRIAL)

Before: THE HONORABLE REBECCA BEACH SMITH
United States District Judge

Appearances:

LAURA M. EVERHART
Assistant United States Attorney
Counsel for the United States

WALTER B. DALTON
Counsel for the Defendant

[19] * * *

THE COURT: Ms. Everhart, call your first witness.

I do direct that the witnesses be separated, and I will leave it up to the attorneys to be sure that one of their witnesses isn't in court while the others testify.

MS. EVERHART: Yes, ma'am. Our first witness will be officer D L. Nichols.

(Mr. Nichols was sworn.)

D. L. NICHOLS, DIRECT EXAMINATION on behalf of the government, as follows:

DIRECT EXAMINATION

BY MS. EVERHART:

[20] Q. Would you state your name, please, sir, and tell us where you are employed.

A. Officer Deion L. Nichols, Norfolk Police Department.

Q. Were you so employed on July 21 of last year?

A. Yes, I was.

Q. On that date did you have occasion to have an encounter with the defendant, Marcus Thornton?

A. Yes, I did.

Q. Is this him seated next to Mr. Dalton at the table?

A. That's correct.

Q. Could tell us how Mr. Thornton first came to your attention?

A. I was traveling –

THE COURT: Can you speak up, Officer Nichols, a little bit?

Is his microphone on? I want to be sure the jury can hear him.

Go ahead.

THE WITNESS: I was traveling northbound on Sewells Point Road. I had come to a stoplight, and I was looking in my rear and sideview mirrors, and I noticed a gold car coming up to my left. I couldn't make out the exact model and make at the time. But anyway, as the car was approaching me, it got maybe two car lengths behind me to my left side, and it had just stopped. It was plenty of space for it to [21] pull up next to me. I kind of wondered why the car did that.

THE COURT: So it did not pull up next to you?

THE WITNESS: It did not pull up next to me. I was kind of curious as to why it did that.

So I waited, and the car never pulled up. So when the light turned green, I took off at a very slow pace, and the car continued to drive even slower, never approached me or come up to my side. And I thought that was odd. I was in an unmarked vehicle at the time in my police uniform. I thought maybe the guy probably had seen my patch on my shirt and didn't want to come up to me for whatever reason.

So I continued to creep at a very slow pace, and the car continued to creep at an even slower pace, and this really piqued my interest as to why this person wouldn't pull up to the side of me. There was a side street to the right. I pulled my car in there and turned around, and I pulled up to the stop sign and waited for the car to pass.

A gold Lincoln Town Car that was driven by the defendant, Mr. Thornton, came past. I pulled in behind that vehicle. I ran the tags on the vehicle, which was YHW 3564, on the gold Lincoln Town Car, and that tag came back to a 1982 Chevy two-door. And I thought, well, there is a problem right there, automatically.

BY MS. EVERHART:

Q. And that car was registered to Marcus Thornton?

[22] A. I can't recall who the car was registered to. I know it came back to a 1982 Chevy two-door.

Q. I would ask you to look at government exhibit 3.

A. It says Marcus Thornton.

Q. So it came back to a 1982 Chevy in the name of Marcus Thornton?

A. Yes.

Q. Of Nevada Avenue, I believe?

A. That's what it says here.

MS. EVERHART: Your Honor, at this time I would move for admission of government exhibit 3.

THE COURT: It is admitted.

(Government exhibit 3, admitted.)

BY MS. EVERHART:

Q. Now, after you ran the tags and found that they belonged to a car other than the car they were attached to, what did you do?

A. Mr. Thornton – he pulled into a parking lot in the 7600 block of Sewells Point Road. I pulled in right behind him. As he exited his vehicle, I also exited my vehicle.

I approached him, asked him for his driver's license, and I told him immediately that the car – that the tags on this vehicle didn't come back to this car. He was sweating and appeared nervous right away. He began to speak in a real rapid manner, stating that someone had just given [23] him the car. He was just very nervous and jittery. I asked him to calm down. I asked him why was he so nervous, and he said for no reason.

For officer's safety, because he was acting so jumpy and everything, I asked him for consent and received consent to pat him down for weapons for my safety. While I was patting him down, I felt a large bulge in his left front pocket. I wasn't sure what it was. So after my pat-down, I asked him if he had any narcotics on him. He hung his head and said, yes, I have a bag of weed on me. I asked if I could have it. He reached into his left front pocket and pulled out two large individual bags, one containing three bags of a green, leafy material consistent with marijuana, and the other bag was a large amount of off-white like rock substance consistent with crack cocaine. He handed that to me.

I told him he was under arrest, placed him in handcuffs. I took him and put him in the back of my unmarked car, and I went to do an inventory search on his car, and I located a nine millimeter Bryco handgun under the front driver's seat. He was the sole occupant of the car at that time.

Q. Backing up a little bit, prior to asking if you could have permission to do a pat-down search of the defendant,

did you ask him about whether he had any guns on his person or in the car?

[24] A. Yes, I asked him if he had any guns, and he said, no, he didn't. I asked him was any weapons, any guns in the car. He said not that he knew of.

Q. When you say an inventory search, were you going to permit that car to remain at that location with tags on it that did not belong to the car?

A. No, I wasn't.

Q. So it was to be towed?

A. Yes.

Q. Is it standard operating procedure to inventory the contents of a vehicle for both the owner's protection as well as for your protection against possible claims of missing property?

A. Yes, it is.

Q. Now, I'm going to show you what has been marked as exhibit number 1-A and also what has been marked as exhibit number 2, and ask if you can identify the drugs and the gun that you recovered that day.

A. Yes, ma'am.

Q. Now, was that gun loaded at the time that you found it?

A. Yes, it was.

MS. EVERHART: Your Honor, at this time I would move for admission of government exhibits 1-A and number 2.

THE COURT: All right. 1-A and 2 are admitted.

(Government exhibits 1-A and 2, admitted.)

[25] BY MS. EVERHART:

Q. Now, could you tell us what you did with the drugs and what you did with the gun.

A. I kept both of them in my sole possession. I contacted Narcotics Investigator Davis. I advised him of what I had. He told me to bring Mr. Thornton down. I called for a transport unit to take him down to (unintelligible) –

THE REPORTER: Wait a minute. I can't understand you.

THE COURT: This is not our normal courtroom we are in. That's why we keep asking. The court reporter and I are usually in another courtroom.

THE WITNESS: I had another marked police unit come by to transport Mr. Davis down to the police operations center on Virginia Beach Boulevard.

BY MS. EVERHART:

Q. Mr. Davis, or Mr. Thornton?

A. I'm sorry. Mr. Thornton. I'm sorry. He was going to meet with Investigator Davis.

I kept the narcotics and the weapons in my possession. I also went down to the police operations center, where I turned both of those items over to Investigator Davis, the narcotics and the weapon.

Q. Now, while the defendant was in your presence, did he make any spontaneous statement?

[26] A. Yes. Without any prompting from me, he stated that he had just robbed some cat out at Ocean View. That's how he came about having the narcotics.

Q. Just robbed some cat, meaning man or person?

A. Yeah.

MS. EVERHART: That's all the questions I have. Please answer any questions Mr. Dalton or the court may have.

BY MS. EVERHART:

Q. Oh, one other thing, excuse me. You mentioned the POC. What is the POC?

A. It is where the detective bureau is.

MS. EVERHART: Thank you very much.

THE COURT: It is what, now?

THE WITNESS: It is where the detective bureau is. It's the first precinct, but the detective bureau is there also.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. DALTON:

Q. Officer Nichols, how long have you been with the Norfolk Police Department?

A. A little over three years now.

Q. What are your normal duties with the Norfolk Police Department?

A. I'm with Metro TAC Special Enforcement Division. We do [27] everything. We have full range over the whole city. On that day I was just on general patrol.

Q. And you indicated that the reason that you ran the license plate was that you suspected the car that Mr. Thornton was driving was the same car that had pulled up at the light and didn't seem to want to pull up next to you; is that correct?

A. Yes.

Q. Are you sure whether it was the same car or a different car, or do you know?

A. I think it probably was a different car. But I ran the tag anyway, and when it came back to a different vehicle, I followed the car till it pulled into the parking lot and stopped. That's when I got out and approached him as he exited his vehicle.

Q. When the license plate didn't match the vehicle, did you suspect it was a stolen car or something of that nature?

A. I didn't really know what to expect at that time. I just know that the tags didn't belong on that vehicle, so I approached, asked him for his driver's license, and he was nervous again right off the bat.

Q. But this was after he had parked his car and gotten out of it and was walking away, is that correct, when you approached him?

A. He had gotten out of his car. He was exiting the car. I [28] didn't know where he was going, but he was

walking away from the car. I approached him, said, can I see your driver's license. I was in full uniform at the time.

Q. Were you in a marked or an unmarked –

A. Unmarked car, yes.

Q. When you asked him for his driver's license, did he give it to you?

A. He gave me some kind of ID. I can't recall right now whether or not it was an ID or a driver's license.

Q. Did you keep his license at that point while you were talking to him?

A. I believe I did.

Q. Did you ever at any time advise him of his legal rights about whether or not he might be obligated to talk to you?

A. Not at that time, I don't think so.

Q. Did you ever do it?

A. I believe I advised him of his rights after he was under arrest.

Q. Now, when you approached him and asked for his driver's license, did you do anything to check on the vehicle, such as run the VIN, the vehicle identification number, to see if it was reported as stolen or anything of that nature?

A. At that time, because of his behavior, I didn't want turn [to] my back on him or turn away from him. I didn't know if he had any weapons on him at that time, so I focused on him. And his [29] behavior seemed odd to me

at the time, so I didn't want to turn away from him and focus my attention on something else, because he was acting so nervous and everything. I had not patted him down at that point, so I wasn't going to turn my back on him.

Q. You said he appeared to be nervous. Was there anything else about his behavior that struck you as odd?

A. He was sweating. His eyes were darting back and forth.

Q. This was in July; isn't that correct?

A. Yes, it was.

Q. It was during the day?

A. Yes, it was.

Q. It was warm outside?

A. I don't recall. I think it probably was.

Q. And after you patted him down, you said you felt this bulge in his pocket. Do you remember which pocket it was in?

A. Left front pocket.

Q. And what did it feel like?

A. It just felt like a squishy type of material. I didn't know exactly what it was. It could have been anything. After I finished patting him down, I asked if he had any narcotics on him. At that point he lowered his head and said he had a bag of weed on him.

Q. Backing up, when you first felt the bulge, can you describe it? How big was it?

[30] A. I can't recall. It was a nice-size bulge.

Q. Was it, say, as big as a golf ball?

A. I can't recall. It just a nice-size bulge in his pocket.

Q. But it was small enough to fit into his pants pocket, whatever was in there?

A. It was in his left front pocket.

Q. When you asked him, then – well, you were pretty confident at that point it wasn't a weapon, weren't you?

A. Yes, I was.

Q. Okay. So you asked him then if he had any narcotics on him?

A. Yes, I did.

Q. That's when he gave his response about having a bag of weed, or something to that effect?

A. He lowered his head and said, I got a bag of weed on me. I asked, may I have it? He reached in his pocket and pulled it out and gave it to me.

Q. After he handed the contents of his pocket to you, you thought there was suspected narcotics, so you arrested him at that point?

A. Yes, I did.

Q. And you remember or you think that you may have advised him of his legal rights at that point?

A. I advised him after I had arrested him, told him he was under arrest. I advised him of his rights then.

[31] Q. Then you proceeded to search the car?

A. That's correct.

Q. Was anyone else there during this time, or was it just you and Mr. Thornton?

A. Just me and Mr. Thornton. I mean, there were some people walking around, but they had nothing to do with the business that we were conducting.

Q. So you conducted the search by yourself; is that right?

A. Yes, I did.

Q. And did you find anything else in the car that was suspicious or contraband or anything of that nature, or just the handgun under the seat?

A. I found a handgun under the driver's seat in which he was sitting.

Q. At the time that you encountered him and asked for his driver's license and so forth, was he free to leave at that point?

A. Yes. I didn't tell him he had to stay. I was just talking to him. He stood there and engaged in conversation.

Q. So you would have let him go if he had said, well, I don't want to talk to you, I'm leaving?

A. Well, he would have had to address the part about the tags not coming out to that car. We would have to still settle that matter.

Q. Did you charge him with anything having to do with [32] irregularity about the tags?

A. No, I did not. I focused on the more serious offense at that time.

Q. So your attention turned from any irregularity about the license plates to whether or not he had weapons or narcotics on him immediately; isn't that correct?

A. Once he presented me with the narcotics and I found the handgun, I didn't worry about the tags anymore. I just focused on the more serious.

Q. Are you aware of whether or not the firearm was ever submitted to see if it could be checked for fingerprints or any examination of that type?

A. I don't know what the investigators did with that.

Q. So that would have been up to an investigator or someone else, but not you, if that would have happened?

A. I wouldn't have fingerprinted it myself, no.

Q. Do you have your notes with you, Officer Nichols?

A. I have some notes right here.

Q. Have you used your notes to refresh your recollection for your testimony today?

A. Yes, I have.

Q. I believe you actually have three sets of notes, do you not? One is dated July 21?

A. That's correct.

Q. Would you look at your notes dated July 21 and tell me [33] where it says on there anything about this oral statement that you said he made.

A. Excuse me?

Q. Would you look on your notes dated July 21, 2001, and tell me where, if anywhere, on those notes there is any indication about this oral statement that you said Mr. Thornton made after you had arrested him.

A. It is not there.

Q. All right. Could you look at your notes that are dated September 26? Do you have those with you?

A. I have these right here.

Q. That's the ones that at the bottom the date on it is July 26?

A. Yes, it is.

Q. Of 2001?

A. Yes.

Q. That appears, to me at least, to be essentially the same as the notes dated July 21, although there appears to be a little more information near the end about the handgun; is that accurate?

A. Yes.

Q. Now, could you tell me where on those notes is any indication about the oral statement that you said he made?

A. It is not there.

Q. All right. Could you look, then, at your notes dated [34] November 9 of 2001.

A. Okay.

Q. Have you got those?

A. Yes, I do.

Q. Those notes talk about the oral statement, do they not?

A. Yes.

Q. They don't really talk about any other facts about the stop or anything, but they talk about this oral statement that you say he made; is that correct?

A. Correct.

Q. And you made those notes on November 9 of 2001 related to a July 21, 2001, stop?

A. Yes, I did.

Q. Now, the information that you have testified to – did you relate that information to Investigator Davis about the circumstances surrounding the stop and so forth?

A. Yes, I did.

Q. And you also turned over the evidence, you said, to him?

A. Yes, I did.

Q. If you could look at your notes again, please, is there – I'm sorry. Directing your attention to the last sentence you have in your notes for November 9, could you

take a look at those, please? I want to ask you about what you said there.

A. Okay.

[35] Q. I believe you indicate there that you advised Investigator Davis that you had not advised Mr. Thornton of his rights, nor had you asked him any questions; is that what is in your notes?

A. That's what it says here, yes.

Q. And yet you testified earlier, did you not, that you believe you did advise him of his rights after you arrested him?

A. Yes, I did. I testified I believed I had at that time.

MR. DALTON: I don't have any further questions, Your Honor.

MS. EVERHART: Just a couple of questions.

REDIRECT EXAMINATION

BY MS. EVERHART:

Q. Is it customary to read somebody their rights – their Miranda rights, as they are usually called, rather – during a routine traffic stop?

A. No, it is not.

Q. If you don't intend to question a defendant, as you did not in this case, is it routine to read them their rights anyway?

A. No, it's not.

Q. Reading the rights has to do with the admissibility of statements; is that correct?

A. Correct.

[36] Q. And that's when a person is in custody, and they are being asked questions, as opposed to a spontaneous statement made by the defendant?

A. That is absolutely correct.

MS. EVERHART: I have no further questions.

THE COURT: All right.

MR. DALTON: May I just follow-up briefly, Judge?

THE COURT: Very briefly.

RECROSS-EXAMINATION

BY MR. DALTON:

Q. On the point Ms. Everhart was just going over with you, you say that you ordinarily would not advise someone of their rights on a traffic stop; is that correct?

A. Correct.

Q. Yet you testified earlier that once you had asked for Mr. Thornton's driver's license, because of his nervousness, you became suspicious and started asked him about things and patting him down and so forth; isn't that correct?

A. Yes, I did.

Q. And I believe you indicated, although you sort of said that he might have been free to leave, you had his license still, didn't you?

A. Yes, I did.

Q. And you began to question him, did you not?

A. I asked him one question, whether he had any narcotics on [37] him – well, I asked him was any weapons in the car or on him, because of his nervous behavior. Once he said he didn't have any weapons on him or the car, I received the consent to pat him down. That's when I found the bulge. And when I felt the bulge in the pocket, I backed away and just asked him, do you by chance have any narcotics on you? That's when he lowered his head and said, yeah, he had weed on him.

Q. You asked him all of these questions without giving him any of his legal rights; isn't that correct?

THE COURT: Can you all approach the bench, please?

(The following discussion occurred at side bar out of the hearing of the jury:)

THE COURT: Judge Morgan has already ruled on this. Why is this proper in front of a jury to be going through all this? Judge Morgan has ruled his constitutional rights were properly observed. So what's the purpose of all this?

MR. DALTON: Basically, Judge, what I'm trying to do is impeach him. He is all over the place in his testimony as far as what he did when and what he made notes about. I'm not trying to relitigate the issue.

THE COURT: I'm going to instruct the jury that the court has already ruled that no constitutional rights –

MR. DALTON: I'm finished with that line of questioning.

THE COURT: I know, but you have left that [38] impression with the jury. I'm going to tell them that it is only being offered for the purpose of the weight they would put to any statement and for impeachment purposes. I'm going to tell them that, because the court has legally ruled, and I think an inference has been raised that somehow constitutional rights have been violated, and the court has ruled on that.

So I'm going to tell the jury that this matter has come before the court, the court has already ruled on it, and that this testimony is all for the purposes of the weight they would give to any statements and the possible impeachment of a witness.

MR. DALTON: I understand, Your Honor.

(Proceedings resumed in open court as follows:)

THE COURT: Ladies and gentlemen of the jury, let me just clarify the reason that the court let the testimony go forward regarding the giving of rights and so forth.

I would first advise you that United States District Judge Henry Morgan of this court has previously ruled that none of the defendant's constitutional rights were violated in taking any statements from him or in seizing any evidence from him. So there is no issue here that his constitutional rights were violated for you to decide.

The only reason the court has let this testimony go forward is for two purposes. You can still decide the weight

that you want to give to the evidence of any statement or [39] evidence that is seized, in other words, the weight that you accord these matters, the statements that are made, and the evidence seized; and secondly, for any impeachment of a witness as to what happened at the time, what they wrote down, and so forth.

But those are the purposes for which it has gone forward, not because there has been any violation of anybody's constitutional rights in regard to taking statements and in seizing evidence. That has been legally ruled on by the court.

All right, Mr. Dalton, if you have anything further, you can go forward.

MR. DALTON: Nothing further, Your Honor. Thank you.

THE COURT: Ms. Everhart, anything further?

MS. EVERHART: No, Your Honor.

THE COURT: All right. Can I excuse Mr. Nichols?

MS. EVERHART: I would prefer that he remain.

THE COURT: All right.

Mr. Nichols, I'll temporarily excuse you. If you would, please remain outside.

THE WITNESS: Yes, ma'am.

* * *

END OF EXCERPT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. ACTION NO. 2:01cr235

MARCUS THORNTON,

Defendant.

ORDER

This matter comes before the court on defendant's motion for a new trial, pursuant to Federal Rule of Criminal Procedure 33. Defendant contends that the firearm introduced into evidence at his trial was obtained pursuant to an illegal search of his car by a Norfolk Police Officer. The court has the discretion to grant defendant's motion "if the interests of justice so require." *Fed. R. Crim. P.* 33.

The issue of whether the officer's search of the defendant's car was proper has already been addressed by Judge Henry Coke Morgan of this court. Following a suppression hearing held on January 24, 2002, Judge Morgan issued an opinion and order on January 28, 2002. In that opinion, Judge Morgan ruled that the search of defendant's car was proper. This court agrees with Judge Morgan's reasoning, and finds the introduction of the firearm at defendant's trial was not improper. Accordingly, defendant's motion for a new trial is DENIED.

The Clerk is DIRECTED to send a copy of this order to defendant and all counsel of record.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

February 19, 2002

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS THORNTON,
Defendant-Appellant.

No. 02-4382

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca Beach Smith, District Judge.
(CR-01-235)

Argued: February 24, 2003

Decided: April 3, 2003

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Judge Williams joined.

COUNSEL

ARGUED: Walter Bruce Dalton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellant. Laura Marie Everhart, Assistant United States Attorney, Norfolk, Virginia, for Appellee. **ON BRIEF**: Frank W. Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Norfolk, Virginia, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A jury convicted Marcus Thornton of possession with intent to distribute cocaine base and two firearm offenses. On appeal, he challenges only the district court's refusal to suppress a firearm found in his automobile, maintaining that it was not legally obtained pursuant to a "search incident to arrest." For the reasons that follow, we affirm.

I.

At a pretrial suppression hearing, the parties produced the following evidence.

On July 21, 2001, Officer Deion L. Nichols, of the Norfolk, Virginia Police Department, driving in an unmarked police cruiser, observed a gold Lincoln Town Car pull to his left that "wouldn't come all the way up to [him]." Assuming that the driver of the Lincoln suspected that he was a police officer, Officer Nichols pulled over to a side street and made a right turn. After the Lincoln passed him, Officer Nichols ran a check on the tags. The check revealed that the tags had been issued to a 1982 Chevy two-door car rather than a Lincoln Town Car. Officer Nichols followed the Lincoln, intending to pull it over. The Lincoln was driven into a parking lot, however, before Officer Nichols "had a chance to do so." Thornton parked the Lincoln and exited the vehicle. Officer Nichols "pulled in behind him and exited [his] vehicle." Officer Nichols, who was in uniform, then approached Thornton, asked him for his driver's license, and told him that his tags did not match the registered vehicle.

Thornton "appeared nervous" and "right away started rambling," "licking his lips," and "sweating." He told Officer Nichols that "someone had just given him the car." "For officer safety," Officer Nichols asked Thornton if he had any narcotics or weapons on him. Thornton said no. The officer then asked him if there were any weapons or narcotics in the car. Thornton again said no. Officer Nichols, "again for officer safety," patted Thornton down, after asking if he could do so. Officer Nichols felt a "bulge" in Thornton's front left pocket. The officer "didn't know what it was, so [he] just kind of casually asked Thornton, 'Do you have any illegal narcotics on you?'" Thornton said that he had "a bag of weed." Officer Nichols then asked him if he could have the bag. Thornton "reached into his pocket" and "pulled out two individual bags," one containing three bags of a "green leafy material consistent with marijuana" and the other with a "large amount of an off-white rocklike substance consistent with crack cocaine."

At that point, Officer Nichols handcuffed Thornton and advised him that he was under arrest. (At trial, Officer Nichols testified that he immediately thereafter put Thornton in the back of the patrol car.) Then, "[i]ncident to that arrest," the officer searched the vehicle and found a "BryCo .9-millimeter handgun" under the front driver's seat, where he had observed Thornton sitting. On the way to the police station, Thornton told Officer Nichols, "without any provocation," that he had "just robbed some cat out at Ocean View, and that's where he got the dope."

On December 12, 2001, a grand jury charged Thornton with possession with intent to distribute cocaine base, in violation of 21 U.S.C.A. § 841(a)(1) (West 1999), possession of a firearm after having been previously convicted of

a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C.A. § 922(g)(1) (West 2000), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C.A. § 924(c)(1) (West 2000).

Thornton moved to suppress the drugs, his statement, and the firearm on various grounds. After a hearing, the district court denied the motion, finding, *inter alia*, that Officer Nichols lawfully searched Thornton's automobile incident to his arrest and, alternatively, that Officer Nichols could have conducted an inventory search of the automobile.

On February 8, 2002, a jury convicted Thornton on all three counts. Thornton moved for a new trial, again arguing that the automobile search was unlawful. The district court denied the motion based on the earlier suppression ruling. On May 3, 2002, the district court sentenced Thornton to 180 months imprisonment and eight years of supervised release. Thornton appeals, challenging only the district court's refusal to suppress the firearm; he does not challenge the refusal to suppress the drugs or his statement.

II.

In reviewing the district court's denial of a motion to suppress evidence, we review legal conclusions *de novo* and factual findings for clear error. *See United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002).

Thornton's sole contention on appeal is that the search incident to arrest doctrine, as applied to searches of automobiles in *New York v. Belton*, 453 U.S. 454 (1981),

required Officer Nichols to "initiate . . . contact with Thornton, either by actually confronting Thornton, or signaling confrontation with Thornton, while Thornton was still in his vehicle."

A.

It is a well-settled "first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *Belton*, 453 U.S. at 457. In *Chimel v. California*, 395 U.S. 752 (1969), the Court discussed the rationale for and limitations of the "search incident to arrest" exception to that warrant requirement:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-63. The Court has often reiterated the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (citing, *inter alia*, *United States v. Robinson*, 414 U.S. 218, 234 (1973); *Chimel*, 395 U.S. at 762-63).

The Court in *Belton* applied those rationales to the arrest of an "occupant" of an automobile. *See Belton*, 453 U.S. at 460. In *Belton*, a police officer stopped four men, who had sped past the officer. *Id.* at 455. The officer "gave chase, overtook the speeding vehicle, and ordered its driver to pull it over to the side of the road and stop." *Id.* After examining the driver's license and the vehicle registration, the officer determined that none of the men owned the vehicle. *Id.* During that time, the officer also smelled burnt marijuana and saw, on the floor of the car, an envelope marked "Supergold," which he associated with marijuana. *Id.* at 455-56. Accordingly, the officer directed the men to get out of the car and arrested them for unlawful possession of marijuana. *Id.* at 456. After they exited the vehicle, the officer patted down each of them and "'split them into four separate areas of the Thruway . . . so they would not be in physical touching area of each other.'" *Id.* The officer then searched the passenger compartment; he found Belton's jacket on the back seat, unzipped one of the pockets of the jacket, and found cocaine. *Id.*

The Supreme Court rejected Belton's argument that the search of the passenger compartment of the car exceeded the permissible scope of the search incident to his arrest. The Court began its analysis by observing that for the protection of the Fourth and Fourteenth Amendments

to be realized, courts must fashion a clear set of rules that allow police officers to easily determine in most situations "whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 458 (internal quotation marks omitted). Thus, the Court reasoned, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (internal quotation marks omitted).

The Court then noted the difficulty courts had experienced in fashioning such a rule in the context of an automobile search incident to an arrest:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.

Id. at 460. Because articles within a car's passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],'" the *Belton* Court established the "workable rule" that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that

automobile." *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763) (footnotes omitted).[1]

B.

Thornton contends that the *Belton* rule does not govern this case because he was not an "occupant of an automobile" when Officer Nichols confronted him. In support of this contention, Thornton relies primarily on a line of authority from the United States Court of Appeals for the Sixth Circuit. *See, e.g., United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993). In *Hudgins*, the court elaborated on the principle that Thornton urges us to adopt:

> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable.
>
> . . . .

[1] Although using "occupant" in stating its holding, the *Belton* Court also, as noted above, referred to a "recent occupant." *See id.* at 460; *id.* at 463 (Brennan, J., dissenting); *see also United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (citing *Belton* for the proposition that "[i]ncident to an arrest, police officers may search a vehicle of which the arrestee was a recent occupant").

> . . . However, *where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule*, and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary.

52 F.3d at 119 (emphasis added). *See also Strahan*, 984 F.2d at 156-57, 159 (following this rule and finding that *Belton* did not apply because police *silently* observed the defendant park and exit his automobile and then immediately apprehended him approximately 30 feet away).

This court has not previously addressed the Sixth Circuit's limitation on the *Belton* rule in a published opinion. We note, however, that other courts of appeals have considered the question. Although one court previously embraced a rule consistent with the Sixth Circuit's limitation, *see United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir. 1989) (holding that "ambiguity" necessitating *Belton*'s bright-line rule does not apply "where the police come upon the arrestees outside of an automobile"), three others have refused to do so. *See United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997) (holding that defendant who was next to open car door ready to enter it, was " 'positively linked to [car] prior to his arrest' ") (quoting *United States v. Adams*, 26 F.3d 702, 705 (7th Cir. 1994)); *United States v. Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (holding that fact that defendant "had just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant' of the vehicle"); *United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (declining to adopt rule, advanced by defendant,

that "unless an arrest was made in the arrestee's automobile, a search of the automobile was not 'incident to the arrest' for the purpose of that exception to the warrant requirement").

State courts have also struggled with this issue. *Compare, e.g., People v. Stehman*, 783 N.E.2d 1, 6 (Ill. 2002) ("[W]e find the . . . analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."), *with State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle."); *Glasco v. Commonwealth*, 513 S.E.2d 137, 141-42 (Va. 1999) (same).

Given this division, it is not surprising that the Supreme Court recently granted certiorari on the question of whether *Belton*'s "bright-line" rule "is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle." *Florida v. Thomas*, 532 U.S. 774, 776 (2001). In *Thomas*, Florida's highest court expressly adopted the Sixth Circuit's approach. *See Thomas v. State*, 761 So.2d 1010, 1013 (Fla. 1999) ("We find the recent analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."). After full briefing and oral argument, however, the Supreme Court dismissed the case for want of jurisdiction. *See Thomas*, 532 U.S. at 781.

After carefully considering the question and the conflicting authority, we join those courts that have rejected the limitation of *Belton* to situations in which "the officer initiates contact with the defendant, either by

actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." *Hudgins*, 52 F.3d at 119. We do so for a number of reasons.

First, the Supreme Court has clearly indicated, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile. In *Michigan v. Long*, 463 U.S. 1032 (1983), officers on patrol in a rural area observed a speeding car turn down a road and swerve into a shallow ditch. *Id.* at 1035. When the officers arrived at the scene, they met Long, the sole occupant of the vehicle, "at the rear of the car, which was protruding from the ditch onto the road," with the driver's side door open. *Id.* at 1035-36. Although affirming a subsequent search of the car's passenger compartment as a protective one under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court noted at the outset that "[i]t is clear, and the respondent concedes, that if the officers had arrested Long . . . they could have searched the passenger compartment [under *Belton*]." *Id.* at 1035 n.1. The Court further explained:

> We stress that our decision does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop, although the "bright line" that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an "automatic" search.

Id. at 1049 n.14 (emphasis in original); *see also Thomas*, 532 U.S. at 776 (emphasizing the "bright-line" nature of the *Belton* rule).

Further, the historical rationales for the search incident to arrest doctrine – "the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial" – do not permit the limitation on the *Belton* rule that the Sixth Circuit has adopted and Thornton espouses. *Knowles*, 525 U.S. at 116. "'[D]anger to an officer'" from an arrest and the "need to discover and preserve evidence" continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer. *Id.* at 117-18 (quoting *Robinson*, 414 U.S. at 234-35). Neither the Sixth Circuit nor Thornton suggest otherwise.

Indeed, we believe that Thornton's proposed limitation of the *Belton* rule would raise serious safety concerns for law enforcement personnel. A rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer. For instance, we can certainly imagine the hesitancy of an officer to activate his lights and sirens if the officer encounters the arrestee while conducting undercover surveillance in an area. Moreover, when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others. We

decline to require officers to make this choice. *See Wanzek*, 598 N.W.2d at 815 (The cases adopting the proposed limitation "raise grave public policy issues because they create serious concerns for the safety of officers and others."); *Thomas*, 761 So.2d at 1014-15 (Wells, J., dissenting) ("The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest."); *Stehman*, 783 N.E.2d at 11 (Thomas, J., dissenting) ("[W]hether the defendant exits voluntarily or involuntarily, there is always a danger to the officer associated with the subsequent arrest and the proximity of the vehicle.").

Additionally, the limitation on the *Belton* rule that Thornton urges could "encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached." *Wanzek*, 598 N.W.2d at 815. Surely, "[p]olice officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search." *Id.*

Nonetheless, we recognize the concerns of those courts that have attempted to limit the scope of *Belton* to situations in which officers have initiated contact with arrestees while still in the automobile. The *Belton* rule cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit or how far he is from the vehicle when arrested.

In the case at hand, however, we note that Thornton concedes that he was in close proximity to his vehicle

when Officer Nichols approached him. His concession is well-taken. Although the record is not clear as to the precise distance between Thornton and his automobile when Officer Nichols confronted him, the record does conclusively show that Officer Nichols observed Thornton park and exit his automobile and then approached Thornton *within moments.*

Thus, "no doubt exists that the car was within [Thornton's] immediate control at the beginning of his encounter with" Officer Nichols. *See United States v. Johnson*, 114 F.3d 435, 440 (4th Cir. 1997) (so noting in case involving question of unreasonable delay between arrest and search of car). Stated differently, Thornton "was 'positively linked' to the searched vehicle prior to his arrest." *Sholola*, 124 F.3d at 817 (quoting *Adams*, 26 F.3d at 705); *id.* at 823 (Wood, J., concurring) ("The 'positive link' required must, in keeping with *Belton*, be one that requires physical proximity that is the equivalent of occupancy of the automobile."); *see also Franco*, 981 F.2d at 473 (affirming validity of search under *Belton* because defendant "was a recent occupant of his vehicle[,]" "the arrest was made in close proximity to his vehicle[,]" and "[d]uring the illegal transaction [defendant] exercised control over his vehicle and its contents"). The conceded close proximity, both temporally and spatially, of Thornton and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless.[2] Accordingly, we hold that

[2] We also note that circuit precedent, which Thornton does not challenge, permitted Officer Nichols to separate Thornton from the vehicle (in this case by handcuffing him and placing him in the patrol

(Continued on following page)

Officer Nichols lawfully searched Thornton's automobile incident to the arrest. Because we affirm on this ground, we decline to reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

car) prior to the search. *See United States v. Milton*, 52 F.3d 78, 80 (4th Cir. 1995) (holding that *Belton* "applies even if the arrestee has been separated from [the vehicle] prior to the search of the passenger compartment" (internal quotation marks omitted)); *see also* 3 Wayne R. LaFave, *Search & Seizure* § 7.1(c), at 448-49 (3d ed. 1996 & Supp. 2003) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers.") (footnotes omitted).

JUDGMENT

FILED: April 3, 2003

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 02-4382
CR-01-235

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MARCUS THORNTON

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

Patricia S. Connor
/s/ Patricia S. Connor
CLERK

(ORDER LIST: 540 U.S.)

MONDAY, NOVEMBER 3, 2003

* * *

CERTIORARI GRANTED

* * *

03-5165 THORNTON, MARCUS V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

* * *